Pace Oldsmobile, Inc. *and* **Amalgamated Local Union 355.** Cases 2-CA-16958 and 2-CA-17107

December 16, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 1, 1981, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent had engaged in certain conduct which violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended. Thereafter, the Board filed a petition for enforcement of its Order in the United States Court of Appeals for the Second Circuit. On May 28, 1982, the court issued its decision which enforced the Board's unfair labor practice findings, except for the finding that Respondent violated Section 8(a)(5) and (1) of the Act by committing numerous and serious unfair labor practices in response to the Union's demand for recognition based on a card majority.[2] The court denied enforcement of that portion of the Board's Order, finding that the concomitant decision to grant a bargaining order was not preceded by the kind of analysis the court required before enforcing such an order.

The court noted that in *J. J. Newberry Co.* v. *N.L.R.B.*, 645 F.2d 148 (2d Cir. 1981), it had reaffirmed the general principle that elections, rather than bargaining orders, are the preferred remedy for employer misconduct during an organizational drive. Quoting *Newberry*, the court stated that:

> "[t]he mere presence of . . . a [hallmark] violation . . . does not automatically preclude a fair second election or mandate the issuance of a bargaining order . . . . Rather than react in knee jerk fashion to the presence of a hallmark violation, the Board must still analyze the nature of the misconduct and the surrounding and succeeding events in each case in an effort to assess the potential for a free and uncoerced election under current conditions.[3]

The court also found that the bulk of the unfair labor practices found by the Board occurred early in the period of conflict and that, approximately 2 weeks after these unfair labor practices occurred, 14 or 15 of the employees, "far from being intimidated into suppressing their pro-Union views, were willing to express those views quite publicly: they went on strike. And they remained on strike for nearly two months." The court concluded that "[s]urely the employees' strike—an act far more likely to have serious adverse consequences than a secret ballot vote—provides reason to question a facile conclusion that a fair election was 'improbable if not impossible.'"[4] The court reaffirmed its determination in *J. J. Newberry* that "[o]nly where there is a substantial danger that employees will be inhibited by a[n] employer's conduct from adhering to the union should a bargaining order issue."[5]

The court also noted that Respondent sought to have the Board consider Respondent's allegation that as of December 21, 1981, there were 10 new employees in the 21-person bargaining unit. Although Respondent had failed to raise the matter of employee turnover before the Board, the court, inasmuch as it was remanding the case, directed the Board to consider whether the changes in the work force have made a bargaining order inappropriate, even if one might have been appropriate at some earlier time.

On August 13, 1982, the Board advised the parties that it had decided to accept the remand and that they might submit statements of position with respect to the issue raised by the remand. Thereafter, the General Counsel, the Charging Party, and Respondent each filed statements of position. Respondent also filed a statement in reply to those filed by the General Counsel and the Charging Party.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record as a whole, the decision of the United States Court of Appeals for the Second Circuit remanding the proceeding, and the parties' respective statements of position. For the reasons set forth below, the Board has decided to affirm its initial decision that Respondent violated Section 8(a)(5) and that a bargaining order is warranted.

I

Respondent operates an automobile dealership in New Rochelle, New York, and sells and services cars. In September 1979,[6] Respondent hired Robert Kennedy as a counterman in the parts department. During the conversation immediately before he was hired, Kennedy asked Parts Manager Joseph

[1] 256 NLRB 1001.
[2] 681 F.2d 99.
[3] *Id.* at 101, quoting *J. J. Newberry, supra*, 645 F.2d at 153.
[4] *Id.* at 102.
[5] *Id.*, quoting *J. J. Newberry, supra*, 645 F.2d at 154.
[6] All dates herein are in 1979 unless otherwise indicated.

Montenaro if Respondent's employees were unionized. Montenaro remarked that "if there was ever a union in [the] shop, [he'd] fire everybody."[7]

In November, the Union began organizing Respondent's employees. On November 18, Montenaro pointed out an employee as a "union instigator" to his assistant, Kenneth Barrett, and stated that if he were the owner, he would fire the employee. On November 27, the Union began distributing authorization cards which were signed by a majority of the 18–22 employees in the service department.

On November 28, the day after Kennedy had signed an authorization card, he was engaged in a conversation with fellow employee Gus Loaiza in the presence of Montenaro and Barrett. Kennedy asked Loaiza if he was going to attend a union meeting. Montenaro abruptly left and went into the office. Later that day, Montenaro notified Kennedy that he was being laid off.[8]

On November 28, the same day it laid Kennedy off, Respondent posted a notice to its employees announcing that, effective the first of the year, it would pay all costs for insurance for all employees and their dependents.

On December 4, the Union demanded recognition and gave Respondent duplicates of authentic authorization cards bearing the signatures of a majority of the service department employees.

Shortly thereafter, on December 10, Montenaro told Barrett that Kennedy was let go because he was a union instigator. Montenaro then questioned Barrett as to whether he was involved with the Union, whether he had gone to union meetings, and whether he had signed an authorization card. Montenaro promised Barrett that Respondent would pick up all of the cost of insurance, and stated that Respondent's owner would rather close the business and reopen it elsewhere if the Union came in. During this same period, Service Manager Joseph Marini told employee Richard Neubauer that if the employees chose the Union to represent them, they would lose the profit-sharing plan, and could get fired or laid off. Around this same time, Montenaro told employee Eugene Rosenfeld, the employee he had earlier identified as a "union instigator," that if the Union got in, the employees would lose the pension and profit-sharing benefits, and that if Rosenfeld did not support the Union he would get early entry into the pension and profit-sharing plan.

On January 2, 1980, the service department employees held a meeting and, after noting Kennedy's layoff and the various other unlawful statements described above, voted to strike. On February 27, 1980, the employees decided to end this unfair labor practice strike, and unconditionally offered to return to work. Respondent reinstated many of those who did offer to return, but unlawfully refused to reinstate strikers Barrett, Rosenfeld, and Neubauer and unlawfully reinstated a fourth striker, DiPasquale, as a utility man rather than to his former position as a truckdriver.

Based on these facts, the Board concluded that Respondent violated Section 8(a)(3) and (1) of the Act by laying off Kennedy, and refusing properly to reinstate unfair labor practice strikers Barrett, Rosenfeld, Neubauer, and DiPasquale because of their union activities. The Board also concluded that Respondent violated Section 8(a)(1) of the Act by threatening the loss of benefits if employees supported the Union; by promising and granting increased insurance benefits; by threatening to discharge employees who supported the Union and to close the facility and move it elsewhere should the employees select the Union to represent them; and by interrogating an employee about his union activities. As noted earlier, the court affirmed these findings.

II

We have examined the record and conclude that the nature of the misconduct and the surrounding circumstances and the succeeding events in this case indicate that "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order . . . ."[9]

Respondent began its antiunion campaign by laying off employee Kennedy almost immediately after overhearing him invite another employee to a union meeting, and later told another employee that Kennedy was fired because of his union activity. Such an unlawful action goes to the heart of the Act by imposing on an employee the ultimate penalty for engaging in union activity. The effect of this precipitous action could not be lost on other employees who might desire to participate in the organizational efforts; it is a clear statement that union activity is inconsistent with continued employment and that such activity will not be permitted. *Hambre Hombre Enterprises, Inc., d/b/a Pan-*

[7] This statement was not litigated as or found to be an unfair labor practice, but was credited testimony.

[8] As was found in the previous decision, Kennedy had no prior notification that he was going to be laid off, and had no prior warnings. 256 NLRB at 1005.

[9] *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 614–615 (1969).

chito's, 228 NLRB 136 (1977), enfd. 581 F.2d 204 (9th Cir. 1978).

Concomitantly with this unlawful action, Respondent announced that it would assume the full costs of its employees' health benefits. Later, in January 1980, it fulfilled this promise and undertook these payments. Both the promise and the grant of benefits were made to each employee in the relatively small unit, and were found to be in violation of the Act. As the Supreme Court noted in *Exchange Parts*,[10] such an action restrains employees in the exercise of their rights because they "are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."[11] In addition to reaching each employee in the unit with the initial impact of the promise and the grant of the benefits, these favors are consistently received by employees over the course of their employment, thus making the impact of the benefits an enduring one.

Besides this unlawful conduct, Respondent repeatedly threatened to fire union activists, threatened different employees with the loss of benefits if the Union were selected, and interrogated another employee about his involvement with the Union. Furthermore, Respondent threatened to close the facility and move it elsewhere if the Union were selected. This threat, credible because it was uttered by a responsible supervisor, the manager of the parts department, is tantamount to a threat to terminate the entire employee complement if a majority of them determine that they desire union representation, and is "possibly the most serious type of unfair labor practice." *Chromalloy Mining and Minerals* v. *N.L.R.B*, 620 F.2d 1120, 1130 (5th Cir. 1980).

It is true, as the court noted, that after these unlawful actions occurred, the employees discussed the incidents and voted to go out on strike, remaining out for almost 2 months. After the strike ended, Respondent unlawfully refused to reinstate three strikers and unlawfully reinstated a fourth employee to a less desirable position. These illegal actions directly affected approximately 20 percent of the unit, and were an additional statement to employees—old and new—of the high price Respondent would exact for engaging in union activity. This unlawful conduct, which was tantamount to three discharges and one demotion, again demonstrated in the clearest terms Respondent's determination not to accept its employees' union activities passively. It is reasonable to conclude that employees who might at one point have been willing to risk Respondent's retaliation for union activities would not be so willing after 20 percent of the unit was so clearly and seriously discriminated against because of union activity.

Further, such actions would not only affect employees who were employed at the outset of the union activity, but also those who came to the employment either during or after the strike. Thus, even if Respondent's employee complement has undergone the turnover claimed by Respondent,[12] it is reasonable to assume that Respondent's actions before and after the strike would be the topic of discussion and repetition,[13] and that the coercive, chilling impact would linger long after the strike participants had either returned to or departed from Respondent's employ.

Moreover, substantial turnover does not warrant the withholding of a bargaining order, especially where, as here, the employer has engaged in "hallmark" violations such as the discharge of union adherents and the threat of plant closure. *Highland Plastics, Inc.*, 256 NLRB 146, 147 (1981). See also *Chromalloy Mining and Minerals* v. *N.L.R.B., supra.*

Based on all of the above, we find that the likely effect of Respondent's unlawful conduct would be to instill in employees the fear that union representation would be detrimental to their continued employment, and that such fear would continue to be operative even in the event of a second election. Respondent's constant and widespread acts, including the discharge of a leading union adherent, the promise and grant of benefits, threats of discharge, loss of benefits and plant closure, and the failure to properly reinstate strikers, signaled to employees its displeasure at union activity and the lengths to which it would go to stifle the employees' right of self-organization. Such conduct would not be soon forgotten. Nor do we think it likely that simply requiring Respondent to refrain from repeating such conduct, the traditional remedy, will successfully eradicate the lingering effects of Respondent's unlawful conduct nor deter the recurrence of unfair labor practices.

For all the above reasons, we find the possibility of erasing the effects of Respondent's unfair labor practices and of ensuring a fair rerun election by the use of traditional remedies is slight, and that

[10] *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405 (1964).

[11] *Id.* at 409.

[12] Respondent alleged before the court that there were 10 new employees in the 21-person unit. In an affirmation filed by Respondent's counsel with the Board, Respondent asserts that 9 of the 18 unit employees in the unit on December 4, the date of the Union's demand, are still employed. We accept these figures as an offer of proof of the approximate degree of employee turnover since Respondent engaged in the unlawful conduct described above. See *Glomac Plastics, Inc.* v. *N.L.R.B.*, 600 F.2d 3 (2d Cir. 1979).

[13] *Continental Investment Company*, 236 NLRB 237 (1978); *Coach and Equipment Sales Corp.*, 228 NLRB 440 (1977).

employees' representational sentiment once expressed through authorization cards would, on balance, be better protected by our issuance of a bargaining order than by traditional remedies. We will therefore affirm our initial Order in its entirety.

ORDER

Based on the foregoing, and the entire record in this proceeding, the National Labor Relations Board hereby affirms its Order issued in this proceeding on July 1, 1981, reported at 256 NLRB 1001.